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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 737

NICK CHOURNOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not write an opinion. Its findings of fact and conclusions of law appear in the record at pages 15-23. The opinion of the court of appeals (R. 413-417) is reported at 193 F. 2d 321.

JURISDICTION

The judgment of the court of appeals was entered December 20, 1951 (R. 417-418). A petition for rehearing was denied February 1, 1952 (R.

419). The petition for a writ of certiorari was filed April 26, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

QUESTION PRESENTED

The court of appeals has affirmed a judgment for the United States in a suit brought under the Federal Tort Claims Act for damages alleged to have resulted from improper issuance and withholding of grazing permits under the Taylor Grazing Act. The question presented is whether the administrative action of which petitioner complains was taken in the execution of a statute or regulation or in the exercise of a discretionary function, so as to be excepted from the coverage of the Federal Tort Claims Act.

STATUTES AND REGULATIONS INVOLVED

1. Pertinent portions of the Federal Tort Claims Act, as they appear in Title 28, United States Code (1946 ed., Supp. IV), are as follows:

> Sec. 1346(b). Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant

in accordance with the law of the place where the act or omission occurred.

Sec. 2680. The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

2. Pamphlets published by the Department of the Interior and containing in their entirety the Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, as amended, 43 U.S.C. 315, *et seq.,* the Pierce Act of June 23, 1938, 52 Stat. 1033, 43 U.S.C. 315m-1–4, and the Federal Range Code for Grazing Districts, 43 C.F.R., Part 161, have been filed with the Clerk by petitioner for use by the Court. Section 3 of the Taylor Grazing Act provides in part:

Sec. 3. That the Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, * * *. Prefer-

ence shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, * * *.

STATEMENT[1]

The lands involved in this suit are located in Box Elder County in northwestern Utah (R. 2). Prior to 1862 this entire area was part of the public domain of the United States (R. 3). The Government in that year granted the odd numbered sections in the area to the Central Pacific Railroad Company (R. 3), and in 1896 granted to the State of Utah sections 2, 16, 30 and 32 in each township (R. 4, 75-76). Thus, a checkerboard pattern of ownership was created in the area which has since been used exclusively for the grazing of livestock (R. 3-4). Because the lands in the checkerboard are unfenced, it is impossible to graze animals on the public domain without trespassing on the railroad or State lands, and *vice versa* (R. 4, 94).

In 1935, pursuant to the Taylor Grazing Act, there was established in northwestern Utah the Promontory Grazing District, comprising 4,714,-

[1] While many of the factual details which follow are immaterial to the simple issue which, in our view, disposes of petitioner's suit under the Tort Claims Act, we set the facts forth in full for the convenience of the Court.

000 acres, of which 1,186,806 acres were public lands (R. 1-2, 17, 391, 413; Report of the Secretary of the Interior (1935), p. 18). For administrative convenience, this district was divided into several winter and summer grazing units (R. 78-85, 95, 391; Plaintiff's Original Exhibit No. 1). Soon after the establishment of the district, regular grazing permits were issued under Section 3 of the Taylor Grazing Act, up to the full carrying capacity of the public lands, to qualified owners of base lands in the district classified as dependent by use, pursuant to the provisions of sections 161.2(g), 161.4 and 161.6(b) of the Federal Range Code. There were no public lands available for applicants in lower classifications. (R. 16, 252-253, 256-262, 275, 355, 394, 413-414.)

The intermingled railroad lands, under the ownership of the Southern Pacific Land Company, caused serious problems in the administration of the grazing district, and in December, 1936, the Government and the Land Company entered into a cooperative agreement to solve the difficulties (R. 365-366, 372, 414). This agreement, which was renewed from year to year until it was permitted to expire on October 31, 1946 (R. 164, 372), gave to the United States control of the railroad lands, both leased and unleased, to be administered as grazing lands jointly with the intermingled public lands (R. 367-369, 372). The agreement provided that the Government would issue grazing permits for the federal range to the Land Com-

pany's lessees to the extent of the priority and commensurability of the leased lands, as determined in accordance with the Federal Range Code, and that, in cases where the leased lands had no priority, the Government would issue to the lessees exchange-of-use licenses [2] without fee to the extent of the carrying capacity of the leased lands (R. 367-368, 372-373).

Petitioner has been engaged in the raising of sheep for some 27 years (R. 4, 77). He carries on his summer grazing operations in Rich County, Utah, approximately 150 to 200 miles from the area here involved, and until 1947 carried on his winter grazing operations in another part of the Promontory Grazing District, not here involved, where he was a land owner and held both regular grazing permits for the public domain and exchange-of-use licenses (R. 263, 288, 290-291, 292). After its cooperative agreement as to the use of its lands was permitted to expire on October 31, 1946, the Land Company placed its lands in the checkerboard area on the market. Petitioner knew that large numbers of livestock had been grazing in the area for many years (R. 153), but desiring a more stable

[2] Exchange-of-use licenses, not specifically provided for in the Federal Range Code (R. 190), are used in checkerboard areas in order to promote the use of public lands and the intermingled private lands which have no priority (R. 186-187). Under an exchange-of-use license, the owner surrenders management of his land to the Government, and such land is thereupon treated as public land. In return, the owner receives a license to the capacity of his private lands for grazing on the intermingled lands, and other licensees may graze on his lands. (R. 89, 338-342.)

and permanent winter range than he then possessed and believing that ownership of the railroad sections would give him the exclusive right to graze on the intermingled public lands, he purchased approximately 73,600 acres of the railroad lands [3] and leased approximately 12,160 acres in the even numbered sections from the State of Utah (R. 2-4). Most of these lands are located within winter grazing units (R. 80, 414). There are approximately 230 sections within the exterior boundaries of petitioner's lands, of which he owns or controls approximately 62% (R. 414; Pet. 7). Other stockmen also own lands within the perimeter of petitioner's lands (R. 275, 284-285).

In 1947, upon his purchase of the railroad lands, petitioner did not apply for a regular permit to graze on the public lands (R. 153). Instead, he attended a conference between the district range manager and some thirty or forty stockmen, who owned land in the checkerboard and customarily used the winter grazing units, to discuss the changed situation resulting from the sale of the railroad lands (R. 155-156, 287). Petitioner was advised that the solution to the problem was in exchange-of-use licenses, or, if he did not wish to use the lands, in a Pierce Act lease to the Secretary of the Interior (R. 287).[4] Petitioner willingly

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[3] Petitioner acquired about 50,000 acres of the railroad lands in 1947 and about 23,000 acres in 1948 (R. 85, 88, 153).

[4] Under the Pierce Act (52 Stat. 1033, 43 U.S.C. 315m-1), the Secretary of the Interior is authorized to lease privately owned grazing lands within grazing districts "when, in his

agreed to accept the exchange-of-use arrangement (R. 156), and applied for and was granted an exchange-of-use license for the grazing of 4,727 head of sheep in the checkerboard during the 1947-1948 winter grazing season (R. 17, 155, 338-342). He was also granted a crossing permit which entitled him to trail his sheep over public lands from his summer range to the area here in question and return (R. 17, 347-348). Pursuant to the crossing permit and exchange-of-use license, he brought 4,500 head of sheep into the winter units during the winter of 1947-1948 (R. 91).

In September of 1948, petitioner made application to trail from his summer range to the area here involved, as he had done in the previous winter season. On October 5, 1948, he was advised by the range manager that, since his exchange-of-use license had expired, he was not entitled to trailing privileges, and that, if he desired to trail, he should renew the license. (R. 17-18, 223-225, 281, 346-347.) On October 12, 1948, petitioner filed an application for a permit for the exclusive grazing of 7,000 sheep on the public lands within the boundaries of his own lands beginning on November 1, 1948 (R. 86-87, 334-337, 348-349, 415). After an unsuccessful attempt to arrange a conference for discussion of the range problems with petitioner (R. 225-226, 411), the range manager advised peti-

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judgment, the leasing of such lands will promote the orderly use of the district and aid in conserving the forage resources of the public lands therein * * *."

tioner that his application would be submitted to the District Advisory Board [5] for recommendation (R. 100-101, 349-350).

By letter of December 28, 1948, petitioner was notified that the Advisory Board had recommended the denial of the grazing permit application because his lands were considered as being of parallel use and not dependent on the federal range (R. 389; see R. 262). After reconsideration by the Board, he was advised by the range manager on May 5, 1949, that the Board had affirmed its prior recommendation and that the range manager, adopting this recommendation, would not issue the permits (R. 18-19, 115, 389, 415). On May 19, 1949, petitioner filed an administrative appeal from the decision of the range manager (R. 115, 389). After a hearing on April 10, 1950 (R. 115, 390), the hearing examiner on August 14, 1950, affirmed the decision of the range manager (R. 117, 403), holding that none of petitioner's lands were dependent by use within the provisions of the Federal Range Code (43 C.F.R. sec. 161.2(g)) because (1) they were not forage producing lands distinct from the federal range, and (2) a great portion of the lands had never been offered as base lands in an application filed before the deadline,

[5] Section 18 of the Taylor Grazing Act, as added by the Act of July 14, 1939, 53 Stat. 1002, provides for the creation and functions of District Advisory Boards of local stockmen so "that the Secretary of the Interior may have the benefit of the fullest information and advice concerning physical, economic, and other local conditions in the several grazing districts * * *."

or, if they had, had lost any claim to dependency by use by virtue of non-use for two consecutive years (R. 395-402). Petitioner filed an appeal from the decision of the hearing examiner to the Director of the Bureau of Land Management, which appeal is now pending (R. 19, 120-121).

Meanwhile, there had been additional discussions and negotiations as to the use, if any, to be made of the federal range by petitioner during the winter grazing season of 1948-1949.[6] Knowing that petitioner desired to operate in the area even though he had no permit, the range manager invited petitioner to attend a meeting on November 5, 1948, of all sheep owners in western Box Elder County for the purpose of working out a change in range lines necessitated by changes in the ownership of land during 1948 (R. 226). Petitioner attended this meeting, but could not reach any agreement with the other stockmen, and he announced that he was going to use his own land as he saw fit (R. 227, 266). The range manager pointed out that there appeared to be no way for petitioner to use the area without trespassing on public lands unless he obtained an exchange-of-use license (R. 20, 227). Petitioner replied that he was not satisfied with the exchange of use for the past winter and was not going to enter into such an agreement for the present winter (R. 94, 227).

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[6] The winter grazing season for cattle begins on October 16th of each year, while the season for sheep, in which petitioner is interested, begins on November 1st (R. 80, 172, 407-409).

Immediately thereafter, petitioner, although he had no crossing permit or permit to graze on the public lands in the area, and although he had a permit to graze in another part of the district (R. 290-291), brought 5,000 sheep into the area and, of course, in doing so committed trespass on the public lands (R. 93-94, 121, 157, 289, 363-364). The range manager wrote to petitioner asking petitioner to reconsider and to meet with him within 10 days to work out an operation on an exchange-of-use basis, warning that failure to follow the suggestion or otherwise to clarify the situation would force the institution of trespass proceedings for any use made of the federal range (R. 351).

Further negotiations resulted in settlement of a trespass case that had been instituted against petitioner and issuance to him of an exchange-of-use license for 7,255 head of sheep for the period December 29, 1948, to March 31, 1949 (R. 110-115, 233-235, 342-346, 359-365, 387-388, 415). Petitioner has grazed in the winter units ever since under similar exchange-of-use agreements (R. 157).

On February 28, 1949, petitioner filed this action under the Federal Tort Claims Act to recover damages for the alleged wrongful acts of government employees (R. 69). A second amended complaint (R. 1-8) recites the factual background approximately as above stated, and requests judgment for $49,000. The claim is based upon the following allegedly tortious acts by employees of the Gov-

ernment: (1) the refusal to grant to petitioner a permit to graze on the intermingled public lands; (2) the denial of a crossing permit to petitioner and the issuance of the trespass notice with threats of continued trespass actions, thereby forcing petitioner to enter into an exchange-of-use agreement; (3) the issuance of permits in excess of the capacity of the area covered by the exchange of use agreement; and (4) the failure to prevent grazing after the expiration date of the permits (R. 4-8, 35-39, 42, 49-50, 66). After trial, the court announced that judgment would be for the Government (R. 334).

The court held that petitioner's claim to an absolute right to a grazing permit was contrary to a proper construction of the Taylor Grazing Act and the Federal Range Code (R. 22, 326-334). It found that grazing permits on the public lands in the area were issued to qualified applicants who owned lands dependent by use, and that petitioner's lands were not of such classification (R. 16-17). It also found that the denial of the crossing permit and the institution of a trespass action were not designed to coerce petitioner to enter into an exchange-of-use agreement, and that there were no wrongful acts by any government employee, either in the handling of petitioner's requests or in the granting of permits to others (R. 17-22).

The court of appeals affirmed (R. 417-418), holding that, since the Taylor Grazing Act and Federal

Range Code contemplated that the range officials would exercise their judgment and discretion in granting permits and in determining the extent of grazing, so that the purposes of the Act would be accomplished, the granting and rejecting of permits were in the exercise of a discretionary function within the meaning of section 2680(a) of the Federal Tort Claims Act (R. 416-417). It also held that the refusal to grant the permit did not amount to unlawful coercion of petitioner which required him to enter into the exchange-of-use agreement, and that in any event the district court had found that there was no such coercion and that the agreement was voluntary (R. 417). Similarly, the court of appeals approved the district court's finding that the range manager had not permitted petitioner's lands to be overgrazed (R. 417).

ARGUMENT

Petitioner's effort to secure review of administrative action under the Taylor Grazing Act through a suit for damages under the Tort Claims Act is plainly mistaken and was properly rejected by the court below. Apart from the fact that, as the district court found, the official actions of which petitioner complains were wholly proper, the Tort Claims Act affords no jurisdiction for the prosecution of such complaints.

1. The gist of petitioner's claim is his contention (Pet. 7, 17-20, 25-27, 30-31) that, inasmuch as he is the owner (through a recent purchase) of

lands intermingled with public lands which cannot be grazed without trespass on his lands, the preference provision of Section 3 of the Taylor Grazing Act gives him an absolute right to grazing privileges on the intermingled public lands, leaving the grazing officials with no discretion to continue granting permits to the former qualified users. We think this contention is clearly erroneous, but we confine to the margin our discussion of petitioner's error.[7] For even if the argument had merit, it is admittedly an attack upon ac-

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[7] Petitioner argues from the untenable assumption that under Section 3 of the Taylor Grazing Act the owner of land contiguous to the public domain, even though a newcomer, has an absolute preference over all other livestock operators in the area, regardless of past use. Neither the language nor the purpose of Section 3 supports petitioner's assumption, which would lead to results wholly at variance with the Congressional purpose.

Vested by Section 2 of the Act with broad discretion to make rules and regulations and do all things necessary to provide, among other things, "for the orderly use, improvement, and development of the range", the Secretary of the Interior is authorized by Section 3 to issue grazing permits "to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range * * *." Preference is to be given, not merely to owners of adjacent lands (contrast Sections 14 and 15 of the Act), but "to those within or near a district who are landowners engaged in the livestock business".

It is clear that Congress intended to extend a preference to grazers "within or near" a district who had customarily used the public lands for their stock. See *Red Canyon Sheep Co.* v. *Ickes*, 98 F. 2d 308, 313-314 (C. A. D. C.). If there were any basis for the absolute preference petitioner claims, the grazing officials would confront a hopeless dilemma in every case where, as here, public lands in a grazing district were intermingled with private lands whose owner was not engaged in the livestock business. (Until their acquisition by petitioner in 1947 and 1948, the lands upon which he bases his claim were owned by the Southern Pacific Land Company

tions by the grazing officials performed in the execution of regulations issued under the Taylor Grazing Act (43 C. F. R., Part 161). And it is clear that such an attack affords no basis for suit under the Tort Claims Act, which expressly excludes from the jurisdiction it creates any "claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid * * *." 28 U. S. C. 2680(a), *supra*, p. 3. *Sickman* v. *United States*, 184 F. 2d 616, 619 (C. A. 7), certiorari denied, 341 U. S. 939; *Smith* v. *United States*, 101 F. Supp. 87, 88 (D. Colo.).[8]

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which, it is undisputed, was not in the livestock business.) They would either have to (1) withhold all use of such public lands for grazing until the owner of the adjacent lands decided to go into the livestock business, and thus fail to promote the highest use of the public lands (and incidentally destroy livestock operations carried on by others on the lands prior to the enactment of the Taylor Grazing Act) or (2) issue permits to the prior users subject to cancellation whenever the owner of the adjacent lands should decide to become a livestock operator, and thus destroy all possibility of bringing stability to the range. Nothing in the Act suggests that Congress intended to defeat its own purposes by confining the grazing officials to such impracticable alternatives. Instead, recognizing that in many districts there would be insufficient public lands to satisfy the requirements of all those with preference, Congress authorized the Secretary of the Interior to issue permits to such of those having preference "as under his rules and regulations are entitled to participate in the use of the range." See 56 I. D. 62; 56 I. D. 305. And inasmuch as petitioner's lately acquired lands are not qualified under the regulations (R. 395-401), he has no valid basis for complaint in the fact that his application was denied while permits were issued to others who for many years had been grazing the area.

[8] The impropriety of the effort to employ the Tort Claims Act as a new avenue to judicial review of administrative

It is equally clear, as the court below held (R. 416-417), that the Taylor Grazing Act requires the officials administering it, under regulations of the Secretary of the Interior, to exercise judgment in the granting and withholding of grazing permits. Accordingly, petitioner's suit is precluded, not only by the language we have already quoted from 28 U. S. 2680(a), but by the further exception in the same provision of claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." *Oman* v. *United States,* March 19, 1952, No. 4302, C.A. 10, clarifying *Oman* v. *United States,* 179 F. 2d 738 (C.A. 10), relied upon by petitioner (Pet. 26); *Sickman* v. *United States, supra,* at 619-620; *Coates* v. *United States,* 181 F. 2d 816 (C.A. 8); *Cromelin* v. *United States,* 177 F. 2d 275 (C.A. 5).[9]

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determinations is highlighted in this case by the pendency, along with the present suit, of petitioner's appeal to the Director of the Bureau of Land Management from the denial of his application for an exclusive grazing permit (R. 19).

[9] Even apart from the express exceptions in 28 U. S. C. 2680(a), there would appear to be no basis in the Tort Claims Act for the present suit. The actions authorized by that Act are actions for injuries "caused by the negligent or wrongful act or omission of any employee of the Government * * * *under circumstances where the United States, if a private person, would be liable* * * *"* (emphasis added). Here, where petitioner's claim is predicated upon allegedly erroneous grants and denials of access to the public domain, sought under a federal statute providing authority in stated circumstances for the conferring of this benefit, petitioner "can

2. The conclusion that petitioner's suit was properly dismissed is not altered by his contention (Pet. 2, 13-14, 22-24, 28-30) that the livestock of other grazers to whom permits were issued trespassed on his lands. For this complaint is merely a variant of the general argument that the grazing officials erred in their determinations as to the proper recipients of permits. The findings of the district court, undisputed here, establish that permits were issued only during the proper grazing season, that petitioner's lands were not overgrazed to his damage, and that permits were never issued to authorize grazing by other livestock owners on his lands (R. 19-20, 22, 417). As petitioner points out (Pet. 29), one lawfully grazing public lands may be liable in trespass for incidentally using private lands. And so it may be that petitioner would have a cause of action against the permit holders of whose alleged trespasses he complains here. But there is nothing in this complaint which states a valid claim against the United States.

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point to no liability of a 'private individual' even remotely analogous to that which [he is] asserting against the United States." *Feres* v. *United States*, 340 U. S. 135.

CONCLUSION

The decision below is clearly correct and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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